FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1629

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 545 F.2d 1255.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on December 2, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 23, 1977 (Pet. App. C). On April 13, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and includ-

ing May 20, 1977. The petition was filed on that date and was granted on October 3, 1977 (A. 33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars federal prosecution of an Indian defendant for violation of the Major Crimes Act (18 U.S.C. 1153) because of his earlier conviction in Indian tribal court of a lesser included offense arising from the same acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb • • •.

18 U.S.C. 1153 provides in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> • • • •

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

Title 17, Section 321, of the Navajo Tribal Code (1972) provides:

> Any Indian who shall willfully contribute to the delinquency of any minor shall be deemed guilty of an offense and, upon conviction thereof, shall be sentenced to labor for a period not to exceed 6 months.

STATEMENT

On October 16, 1974, an incident involving a young Indian girl occurred on the Navajo Indian Reservation in Many Farms, Arizona. Respondent, a Navajo Indian, was found intoxicated and taken into custody by an Indian policeman at the scene of the incident (A. 14-18); his clothing was disarranged and there was a blood stain on his face (A. 18). Two days later, he pleaded guilty in the Navajo Tribal Court to charges of willfully contributing to the delinquency of a minor and disorderly conduct, in violation of Title 17, Sections 351 and 321, of the Navajo Tribal

Code (1972). *The Navajo Nation* v. *Anthony Wheeler*, Case Nos. CL-321-3245-74 and CL-351-3238-74 (A. 9-10). Respondent was sentenced on the charge of contributing to the delinquency of a minor to serve 60 days in jail or to pay a fine of $120, and on the disorderly conduct charge to serve 15 days in jail (concurrently with the sentence on the first charge) or to pay a fine of $30 (A. 9-10). (The record does not show how the sentence was carried out.)

On May 21, 1975, an indictment was returned in the United States District Court for the District of Arizona (A. 11) charging that respondent, on October 16, 1974, "did assault * * * with intent to rape" the Indian girl, in violation of the Major Crimes Act, 18 U.S.C. 1153, and Ariz. Rev. Stat. Ann. 13-252 (1956). This indictment was dismissed on a ground not relevant here.[1] A superseding indictment (A. 12) returned on November 19, 1975, charged that on October 16, 1974, respondent "did carnally know a female Indian * * *, not his wife, who had not then attained the age of sixteen years but was fifteen years of age," in violation of 18 U.S.C. 1153 and 2023.

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[1] The district court ruled that a provision of 18 U.S.C. 1153 (since deleted from the statute (Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585)) providing that "any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court" was impermissibly vague. (The Solicitor General was not informed of this decision by the United States Attorney and so did not have an opportunity to consider whether the government should appeal it.)

Respondent moved to dismiss this indictment on the ground that his federal prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment because of his previous conviction in tribal court of a lesser included offense arising from the same transaction (A. 25). The district court granted the motion to dismiss (A. 32).

The court of appeals affirmed (Pet. App. A, pp. 1a-8a). The court framed the primary issue as "whether Indian tribal courts and federal district courts are 'arms of different sovereigns' for purposes of the Double Jeopardy Clause" (*id.* at 1a). The court noted that tribal courts "are not merely a political unit of the Federal Government, such as federal district courts, military tribunals, etc.," and that the Indians are " 'a separate people, with the power of regulating their internal and social relations' " (*id.* at 4a-5a, quoting *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 173). The court nevertheless concluded that the Indian tribes "do not have the sovereign status of a state" (Pet. App. A, p. 5a), and therefore that "Indian tribal courts and United States district courts are not arms of separate sovereigns" (*id.* at 6a). The court accordingly ruled that the "dual sovereignty" principle applied by this Court in the federal-state context (see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187) was not applicable to this case.

The court then applied the rule that the Double Jeopardy Clause bars prosecution of a defendant who has previously been convicted by the same sovereign of a lesser included offense based on the same acts

(Pet. App. A, p. 7a; see *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977). The court held that "an individual cannot be indicted in federal court for a crime having been tried in Indian tribal court for a lesser included offense" (Pet. App. A, p. 8a). With respect to the charges here, the court determined that the offense of willfully contributing to the delinquency of a minor (one of the tribal offenses) was a lesser included offense of carnal knowledge of a female under the age of 16 years (the federal charge) (*id.* at 7a-8a). Accordingly, the court affirmed the dismissal of the indictment.

SUMMARY OF ARGUMENT

A. Although the Double Jeopardy Clause generally bars a second prosecution for the same offense after a conviction or acquittal, there is a firmly established exception that applies to separate prosecutions by separate sovereigns. *United States* v. *Lanza*, 260 U.S. 377; *Moore* v. *Illinois*, 14 How. 13. "[A]n act denounced as a crime by both • • • sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States* v. *Lanza*, *supra*, 260 U.S. at 382.

The Court has consistently applied this "dual sovereignty" principle in the context of successive state and federal prosecutions. *Abbate* v. *United States*, 359 U.S. 187; *Bartkus* v. *Illinois*, 359 U.S. 121. In doing so, it has pointed out that "[u]ndesirable consequences would follow" if the principle were abandoned (359 U.S. at 195). If a prior state prosecution were deemed to bar a federal prosecution based on the same conduct, "federal law enforcement must necessarily be hindered," especially where "the defendants' acts impinge more seriously on a federal interest than on a state interest" (*ibid.*). One solution would be "to displace state power to prosecute crimes based on acts which might also violate federal law," but "no one would suggest that • • • [this] is desirable," for it "would bring about a marked change in the distribution of powers to administer criminal justice • • •" (*ibid.*).

At the same time, the Court has refused to extend the dual sovereignty principle to permit successive prosecutions in contexts where both courts derive their authority from the same sovereignty. This is true of municipal courts and state courts (*Waller* v. *Florida*, 397 U.S. 387, 393), and of federal courts and territorial courts (*Grafton* v. *United States*, 206 U.S. 333, 354-355).

The test for determining the applicability of the dual sovereignty principle is whether the two governments are in a meaningful sense "two sovereignties, deriving power from different sources," each of which is "exercising its own sovereignty" in "determining what shall be an offense against its peace and dignity" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382).

B. Under this test, the dual sovereignty principle applies to permit a federal prosecution for a "major crime" following a conviction in an Indian tribal court

for a lesser included offense based on the same conduct.

1. It is a fundamental principle of American Indian law, repeatedly acknowledged by this Court and the Congress, that the Indian tribes are " 'distinct, independent, political communities' " which are "qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty." Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.), quoting *Worcester* v. *Georgia*, 6 Pet. 515, 559. In particular, the power the tribes have to try and punish criminal behavior by Indians in Indian country springs not from any Act of Congress or other authorization of the federal government, but from the tribes' original sovereignty. To be sure, the tribes are subject to the plenary authority of Congress, which has limited tribal court jurisdiction both substantively and procedurally. Congress has also extended federal criminal jurisdiction to certain crimes committed by Indians in Indian country, including the crime with which respondent Wheeler was charged in federal district court in this case. But the criminal jurisdiction retained by the tribal courts is part of the authority of the tribes as "a separate people" (*United States* v. *Antelope*, 430 U.S. 641, 646), as "unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557).

The court of appeals relied on Congress' "complete, plenary control over the criminal jurisdiction of tribal courts" (Pet. App. A, p. 5a) to conclude that the authority those courts exercise is federal authority. This approach, which confuses congressional power to limit tribal authority with the source of the authority the tribe retains, was rejected by this Court in *Talton* v. *Mayes*, 163 U.S. 376, 384.

Since tribal courts exercise "local powers not created by the Constitution" (*id.* at 382), those courts are not so identified with the federal government that a tribal prosecution becomes a prosecution by an arm of the federal sovereign. Therefore, the Double Jeopardy Clause, which forbids a second prosecution "after a first trial for the same offense *under the same authority*" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382 (emphasis added)), does not bar a prosecution in federal court after conviction in a tribal court of a lesser included offense arising from the same acts.

2. Failure to apply the dual sovereignty principle to successive prosecutions by tribal and federal courts would lead to "undesirable consequences" of the same kind that the principle, as applied in the federal-state context, was designed to avoid. Federal law enforcement would be hindered if the Double Jeopardy Clause bars a federal prosecution following a prosecution in Indian tribal court for a lesser included offense. In this case, for example, by pleading guilty to a minor offense in tribal court and incurring a relatively minor sentence (which could be discharged by payment of a $150 fine), respondent would avoid

prosecution in federal court for a major federal crime for which he could be imprisoned for up to 15 years.

Since tribal courts by virtue of the Indian Civil Rights Act (25 U.S.C. 1302(7)) may impose no sentence exceeding six months' imprisonment, it is reasonable to assume that other persons in respondent's position would seek to avoid punishment commensurate with the gravity of their offense by first standing trial or pleading guilty in tribal court. Under existing institutional arrangements, federal authorities would be powerless to prevent this from happening.

To remove the resulting obstruction to federal law enforcement, Congress would be forced to restructure the relationship between tribal and federal authorities. Its most likely response would be to impose further limitations on the powers of tribal courts, or even to eliminate the criminal jurisdiction of those courts. It could do this, however, only at substantial cost to the prevailing federal policy of fostering tribal self-government and, in particular, of encouraging tribes to rely on their own judicial systems as a keystone of that self-government.

C. But even if tribal courts are viewed as arms of the federal sovereign, the Double Jeopardy Clause does not bar prosecution for a Major Crimes Act felony in a federal district court after conviction of a lesser included offense under tribal law in tribal court. Although the "general rule" is that the same governmental authority cannot try a defendant for a greater offense after it has convicted him of a lesser

included offense (*Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977), that general rule "does have some exceptions" (*Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, slip op. 13). The circumstances of this case either bring it within one of the recognized exceptions or warrant recognition of a further exception.

The exceptions recognized by this Court reflect circumstances in which there were compelling reasons why the greater offense could not have been tried, or was not tried, simultaneously with the lesser offense. Such reasons exist in the unique circumstances presented by tribal and federal courts, which as a practical matter operate quite independently of each other (as is also true of tribal and federal prosecuting authorities). The sentencing authority of tribal courts is so limited that they cannot adequately punish defendants who have committed serious crimes. Yet they are empowered to try such defendants, and such power is a legitimate component of tribal self-government. Moreover, they may often bring such prosecutions, as the Navajo court did in this case, before the time when a United States Attorney would be able to secure a federal indictment or, perhaps, even learn of the occurrence of the offense.

In such circumstances it is not unreasonable for the United States Attorney, in the exercise of his separate prosecutorial authority, to institute a subsequent prosecution seeking a penalty commensurate with the defendant's crime. Indeed, such a prosecution would seem compelled by the Congressional policy

reflected in the Major Crimes Act and recognized by this Court.

Moreover, in this unique context, the greater (federal) and lesser included (tribal) offenses should not be regarded as "the same offense" for double jeopardy purposes. In this case carnal knowledge (the federal offense) was not, and could not have been, charged against respondent in tribal court, while contributing to the deliquency of a minor (the tribal offense) was not and could not have been charged against respondent in federal district court. Since no single court had jurisdiction of all the alleged crimes, another exception to the double jeopardy bar is applicable.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT PROSECUTION OF AN INDIAN DEFENDANT IN A FEDERAL COURT BECAUSE OF HIS PRIOR CONVICTION IN AN INDIAN TRIBAL COURT OF A LESSER INCLUDED OFFENSE ARISING FROM THE SAME ACTS.

A. The Double Jeopardy Clause Does Not Bar Successive Prosecutions by Separate Sovereign Governments for the Same Offense.

1. The Double Jeopardy Clause of the Fifth Amendment "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717. The Clause also "forbids successive prosecution and cumulative punishment for a greater and lesser included offense" arising from the same acts. *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977, slip op. 8.

A well-established exception applies, however, in the case of separate prosecutions for the same offense by separate sovereigns. Recognized at least as early as the decision of this Court in *Fox* v. *Ohio*, 5 How. 410 (see *Abbate* v. *United States*, 359 U.S. 187, 190-194; *Bartkus* v. *Illinois*, 359 U.S. 121, 131-132), the "dual sovereignty" principle was explained in *Moore* v. *Illinois*, 14 How. 13, 19, as follows:

> [E]very citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. * * * That either or both may (if they see fit) punish such an offender, cannot be doubted.

In *United States* v. *Lanza*, 260 U.S. 377, the Court for the first time applied the dual sovereignty principle to sustain a federal prosecution (under the Volstead Act) arising out of the same facts as a prior state conviction. The Court said (260 U.S. at 382):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition * * *.

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

"It follows," the Court said (*ibid.*), "that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. • • • [T]he double jeopardy • • • forbidden [by the Fifth Amendment] is a second prosecution under the authority of the Federal Government after a first trial for the same offense under the same authority."

The dual sovereignty principle was reaffirmed in *Bartkus* v. *Illinois*, 359 U.S. 121, and *Abbate* v. *United States*, 359 U.S. 187. In *Bartkus*, which dealt with the validity under the Fourteenth Amendment of a state prosecution following a federal prosecution for the same offense, the Court cited an array of cases as "irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense," and refused to disregard the "long, unbroken, unquestioned course of impressive adjudication" by ruling that due process compelled such a bar (359 U.S. at 136). And in *Abbate*, in which the federal prosecution followed the state prosecution, the Court found "[n]o consideration or persuasive reason not presented to the Court in the prior cases • • • why we should depart from [*Lanza*'s] firmly established principle" (359 U.S. at 195).

Instead, the Court in *Abbate* found that persuasive policy reasons supported continued adherence to that principle (*ibid.*):

> [U]ndesirable consequences would follow if *Lanza* were overruled. • • • [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice • • •. • • • Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.

2. While in *Lanza*, *Bartkus*, and *Abbate* the Court held that the dual sovereignty principle permitted successive federal and state prosecutions, the Court subsequently held in *Waller* v. *Florida*, 397 U.S. 387, that it did not permit successive prosecutions in municipal courts and state courts of general jurisdiction, since the power of the former "springs from the same organic law" that created the latter (*id.* at 393).[2] See also *Grafton* v. *United States*, 206 U.S. 333, 354-355 (Phillipine territorial court "derive[s] its powers" from the federal government); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264 (Puerto Rican and federal courts "whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty"). The test of whether the dual sovereignty principle applies is whether the two governments that seek to prosecute for the same acts are in a meaningful sense "two sovereignties, deriving power from different sources," each of which is "exercising its own sovereignty" in "determining what shall be an offense against its peace and dignity" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382).

The inquiry in the present case, therefore, is whether the Indian tribes possess sufficient characteristics of sovereignty and independence to make the dual sovereignty principle applicable when a federal prosecution follows a tribal court conviction for an offense arising from the same acts. The court of appeals held that they do not, that in essence the tribal courts are arms of the federal government. As we propose to show, however, this conclusion misapprehends the nature of the Indian tribes and of their historically rooted relationship with the federal government. What is more, it threatens to interfere with federal law enforcement in a way that could only be remedied by a major redistribution of legal powers between the federal government and the Indian tribes, at the cost of basic values embedded in the existing Indian policy of Congress and the Executive Branch.

[2] Quoting from *Reynolds* v. *Sims*, 377 U.S. 533, 575, the Court in *Waller* observed (397 U.S. at 392):

> Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.

B. The Dual Sovereignty Principle Applies to Permit Successive Prosecutions by an Indian Tribe and the Federal Government.

1. *The Indian tribes possess attributes of sovereignty from which their authority is derived independently of the federal government.*

a. More than 35 years ago Felix Cohen stated that "[f]rom the earliest years of the Republic the Indian tribes have been recognized as 'distinct, independent, political communities,' and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty."[3] This fundamental principle of American

[3] *Handbook of Federal Indian Law* 122 (1942 ed.) (footnote omitted), quoting *Worcester* v. *Georgia*, 6 Pet. 515, 559. See also *Powers of Indian Tribes*, 55 I.D. 14, 19-20 (1934).

Indian law has repeatedly been acknowledged by this Court and by Congress.[4]

It finds support, first, in the Constitution, which treats Indian tribes *in pari materiae* with States and foreign nations. Article I, Section 8, clause 3. Although the tribes are no longer fully sovereign nations, this Court has emphasized that they possess a "unique status * * * as 'a separate people' with their own political institutions" (*United States* v. *Antelope*, 430 U.S. 641, 646), that they "are unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557), and that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our

[4] As Cohen wrote (*Handbook of Federal Indian Law, supra*, p. 123, footnotes omitted):

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

own Government" (*McClanahan* v. *Arizona State Tax Commission, supra*, 411 U.S. at 172).[5]

To be sure, the Indian tribes are wards of the federal government and are subject to its plenary authority to regulate their affairs. *Winton* v. *Amos*, 255 U.S. 373, 391; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553. Indeed, Congress has imposed substantial limitations upon tribal authority and independence. But to acknowledge that the tribes are subject to such regulation by Congress is not to say that they have lost all vestiges of their original sovereignty. Save where Congress has spoken to the contrary, the tribes exercise governmental powers that derive from their original status as sovereign nations.

Like other peoples who have "the power of regulating their internal and social relations" (*United States* v. *Kagama*, 118 U.S. 375, 382), the tribes have exclusive authority, in the absence of congressional legislation to the contrary, to confer or withdraw tribal citizenship. *Roff* v. *Burney*, 168 U.S. 218, 222; *Cherokee Intermarriage Cases*, 203 U.S. 76; cf.

[5] In *United States* v. *Winans*, 198 U.S. 371, 381, in construing a treaty limitation on the fishing rights of the Yakima Indians, the Court said: "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment * * *. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Santa Clara Pueblo v. *Martinez*, No. 76-682, certiorari granted May 16, 1977. They have "been accorded the widest possible latitude in regulating the domestic relations of their members" (*Handbook of Federal Indian Law*, *supra*, at 137), including the power to grant marriages and divorces (*United States* v. *Quiver*, 241 U.S. 602; *Carney* v. *Chapman*, 247 U.S. 102); to provide for adoptions and guardianships (*Fisher* v. *District Court*, 424 U.S. 382); and to prescribe the manner of descent and distribution of property. *Jones* v. *Meehan*, 175 U.S. 1.

Unless Congress has provided otherwise, the tribes are immune from suit in state or federal court, protected in much the same way as the Eleventh Amendment protects the States and the principle of sovereign immunity protects the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512; *Puyallup Tribe, Inc.* v. *Department of Game of Washington*, No. 76-423, decided June 23, 1977. The tribes possess inherent authority to tax (*e.g.*, *Morris* v. *Hitchcock*, 194 U.S. 384; *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (C.A. 8)), and to regulate conduct on the reservation whether it involves Indians or non-Indians. *E.g.*, *United States* v. *Mazurie*, 419 U.S. 544 (upholding, with respect to non-Indians, a tribal ordinance requiring a license to sell liquor in Indian country).*

* *Williams* v. *Lee*, 358 U.S. 217, illustrates the broad self-governing powers of the Navajo Nation in particular. That case involved a civil suit brought in Arizona state court by a non-Indian to collect for goods sold to an Indian and his wife on the Navajo reservation. After the Arizona Supreme Court upheld the jurisdiction of the lower court, this Court reversed and held that jurisdiction over the matter rested exclusively with the Navajo tribal court. From its previous cases beginning with *Worcester* v. *Georgia*, 6 Pet. 515, the Court concluded that "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (358 U.S. at 220). The Court said that the 1868 treaty between the United States and the Navajo Nation (15 Stat. 667) reflected "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of [the] tribal government * * *" (358 U.S. at 221-222). On the basis of these principles, as well as the finding that no Act of Congress gave state courts jurisdiction over the controversy in question, the Court concluded that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves" (*id.* at 223).

b. Like tribal powers generally, tribal criminal jurisdiction in particular springs from a tribe's original sovereignty. See Department of the Interior, *Federal Indian Law* 444-449 (1958 ed.). This Court has recognized that, in the absence of an explicit withdrawal of jurisdiction by Congress, the power to try and punish criminal behavior by Indians in Indian country inheres in tribal courts, and that this power does not depend on any grant from Congress but is a residual attribute of tribal sovereignty, one that has often been expressly acknowledged by treaty. See *Worcester* v. *Georgia*, 6 Pet. 515, 560-561; *Talton* v. *Mayes*, 163 U.S. 376, 379-380; *United States* v. *Quiver*, *supra*, 241 U.S. at 605-606. In recognition of this retained power, not only the treaties between the tribes and the federal government, but also the original

statutory enactments of Congress, consistently denied the federal courts even concurrent jurisdiction over crimes between Indians in Indian country, leaving exclusive authority to deal with such crimes to the tribes. See generally Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 953-972 (1975).

Thus, the first permanent Indian Trade and Intercourse Act (Act of June 30, 1834, Section 25, 4 Stat. 729, 733) applied to Indian country the laws governing crimes committed in places under the exclusive jurisdiction of the United States, but provided that "[t]he same shall not extend to crimes committed by one Indian against the person or property of another Indian." See 18 U.S.C. 1152. As a result of this limitation on federal authority, this Court in *Ex Parte Crow Dog*, 109 U.S. 556, held that federal courts had no jurisdiction over the murder of an Indian by another Indian on a reservation, since, as the Court later explained, "in the absence of explicit congressional direction, the Indian tribe retained exclusive jurisdiction to punish the offense." *Keeble* v. *United States*, 412 U.S. 205, 209-210.

In response to the *Crow Dog* decision, Congress passed the Major Crimes Act (Act of March 3, 1885, 23 Stat. 362, 385), which made it a federal crime for an Indian to commit any of seven major offenses on an Indian reservation.[7] See 18 U.S.C. 1153. But that Act was "a carefully limited intrusion of federal

[7] The Act presently includes 14 enumerated offenses. See Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585.

power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." *United States* v. *Antelope*, *supra*, 430 U.S. at 643 n. 1, quoting *Keeble* v. *United States*, *supra*, 412 U.S. at 209 (describing the government's characterization of the Act). After enactment of the Major Crimes Act, the Court in *United States* v. *Quiver*, *supra*, reaffirmed that punishment for offenses by one Indian against another, except the offenses enumerated in the Major Crimes Act, remained within the exclusive jurisdiction of the tribes. This principle, the Court said (241 U.S. at 605-606), was "in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[.]"

Indian tribal courts, as the instrumentalities of a tribe's criminal jurisdiction, derive their authority not from the federal government but from the powers of self-government inhering in the tribe.[8] See Clinton,

[8] Indian tribal courts are not to be confused with the Courts of Indian Offenses, so-called "C.F.R. courts," that were established in 1883 by regulations of the Commissioner of Indian Affairs and are still provided for in federal regulations as a vehicle of "law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down * * *" (25 C.F.R. 11.1(b)). See Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 553-554 (1976). The regulations also establish a Code of Indian Offenses enforceable by these courts, but provide that once a tribal law and order code has been adopted by the tribe and

Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 553-564 (1976). No federal statute creates tribal courts, authorizes their existence, or confers jurisdiction on them. Just as no Act of Congress is the source of tribal immunity or the tribal power to tax, so the powers of the tribal courts exist independently as an unextinguished residuum of the tribes' original sovereignty.

Of course, Congress has imposed both substantive and procedural limitations on the exercise of tribal court jurisdiction, as it has on other aspects of tribal authority. The most significant procedural constraints are established by the Indian Civil Rights Act of 1968 (Title II, 82 Stat. 77, 25 U.S.C. 1301, *et seq.*), which requires tribal proceedings to provide most of the protections of the Bill of Rights of the federal Constitution and which limits the punishment tribal courts may impose to that prescribed for petty of-

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approved by the Secretary of the Interior, the provisions in the regulations dealing with the Courts of Indian Offenses are, in the main, no longer applicable to that tribe. Because federal policy since 1934 has generally been to encourage the tribes to set up their own courts (see the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987, 25 U.S.C. 476, *et seq.*), Courts of Indian Offenses exist on increasingly few reservations. See Clinton, *supra*, 18 Ariz. L. Rev. at 554.

There is some question whether Courts of Indian Offenses derive their authority from tribal sovereignty (see *Colliflower* v. *Garland*, 342 F.2d 369 (C.A. 9)), since they were created and operate pursuant to federal regulations. Cf. *Federal Indian Law*, *supra*, at 451-452. But that question is immaterial here because the Navajo Tribal Court is a true tribal court (see p. 26, n. 10, *infra*), not a Court of Indian Offenses.

fenses (see 25 U.S.C. 1302(7)). In addition, the Secretary of the Interior has promulgated regulations relating to the qualification and appointment of tribal judges and providing for the Secretary's approval of tribal criminal codes. See 25 C.F.R. 11.1(d)-11.1(e) and 11.3-11.4; Clinton, *supra*, 18 Ariz. L. Rev. at 554, 557.

But these federal limitations on the authority of tribal courts do not affect the source or character of the authority those courts retain, an authority that springs from the nature of the tribes as "quasi-sovereign * * * entities" (*Morton* v. *Mancari*, 417 U.S. 535, 554).[9] To the extent that Congress has not

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[9] The tribal governmental powers were not, as respondent appears to argue (Memo. in Opp. 7), transformed into federally created powers by passage of the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987. That Act is not an organic one; as Professor Cohen noted (*Handbook of Federal Indian Law*, *supra*, at pp. 129-130), it "had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes * * *." In particular, Section 16 of the Act, 25 U.S.C. 476, provides that a tribe residing on a reservation "shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws," subject to ultimate approval by the Secretary of the Interior. But as the language of this and succeeding sections makes clear, adoption of a tribal constitution under the Act is optional with the tribes and does not affect tribal recognition by the federal government. See, *e.g.*, 25 U.S.C. 478b. Indeed, although 25 U.S.C. 476 grants certain powers to tribes that adopt a constitution under the Act (*e.g.*, the right to employ legal counsel), it states that these powers are "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law * * *."

limited their power, the tribal courts exercise a criminal jurisdiction essentially like that exercised by any sovereign.[10]

c. The court of appeals based its conclusion that the Indian tribes cannot be considered separate sovereigns for the purpose of the Double Jeopardy Clause largely on Congress' "complete, plenary control over the criminal jurisdiction of tribal courts" (Pet. App. A, p. 5a). This approach confuses congressional power to limit (or abolish) tribal authority with the source of whatever authority the tribe retains.

This Court rejected such an approach in *Talton* v. *Mayes*, 163 U.S. 376. There, the federal government's plenary authority over Indian tribes was asserted as a basis for concluding that the Fifth Amendment applied to Indian tribal court proceedings. The question, thus, was "whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress" (*id.* at 382-383). The Court responded that "[t]he repeated adjudications of this court have long since answered the former question in the negative" (*id.* at 383). The Court recognized that all tribal rights of self-government "are subject to the supreme legislative authority of the United States," but held that "[t]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States" (*id.* at 384). "It follows that as the powers of local self-government enjoyed by the Cherokee nation ex-

[10] The institutions of the Navajo Tribe illustrate these principles. The governing law is the Navajo Tribal Code, an extensive legal code (comprising 23 titles and published in three volumes) enacted by the Tribe's elected legislature, the Navajo Tribal Council. Title 17 of the Code contains the law and order provisions, including those that respondent was convicted of violating. Many of these provisions were originally taken over from a law and order code promulgated by the Secretary of the Interior (see 25 C.F.R. 11.38-11.87NH), but once the Code was adopted by the Tribal Council and approved by the Secretary of the Interior (see 25 C.F.R. 11.1(e)), it became the Tribe's law; the Secretary by approving the tribal enactments "had simply recognized the valid governing authority of the Tribal Council," and his own code "was no longer to apply to the Navajo Tribe." *Oliver* v. *Udall*, 306 F.2d 819, 822-823 (C.A.D.C.), certiorari denied, 372 U.S. 908; cf. *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (C.A.D.C.).

Enforcement of the Navajo law and order code occurs in the tribal courts, which consist of the Trial Court of the Navajo Tribe and the Court of Appeals of the Navajo Tribe. See 7 Navajo Tribal Code 101. These courts were established by resolution of the Tribal Council in 1958 to take the place of the Courts of Indian Offenses which had been established on the reservation (see note 8, *supra*; *Williams* v. *Lee*, *supra*, 358 U.S. at 221-222). The new courts were "clearly and exclusively the judicial branch of the Navajo nation." Davis, *Court Reform in the Navajo Nation*, 43 J. Am. Jud. Soc'y 53, 54 (1959); see 1972 Annual Report of the Judicial Branch, Navajo Nation 8 ("The Courts of the Navajo Nation derive their authority and power from the Navajo Tribal Council * * *"). In recent years approximately 29,000 criminal cases annually are filed in these courts. 1976 Annual Report of the Judicial Branch, Navajo Nation 24.

isted prior to the Constitution, they are not operated upon by the Fifth Amendment • • •" (*ibid.*).

The position of the court of appeals cannot be squared with *Talton*. If tribal courts exercise "local powers not created by the Constitution" and not subject to the Fifth Amendment, they are not so identified with the federal government that a tribal prosecution becomes a prosecution by an arm of the federal sovereign.[11] *Talton* establishes that, contrary to the court of appeals' approach, the relevant focus in defining the nature of tribal self-government is not on the power of the federal government to limit tribal authority, but on the source from which the tribal authority springs. That source, with the Navajos as with the Cherokees, "existed prior to the Constitution" and does not flow from the Constitution. The source of authority of the tribal courts is not the federal gov-

[11] Respondent argues (Memo. in Opp. 8-9) that reliance on *Talton* is no longer valid because the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, *et seq.*, now subjects tribal authority to most of the same restrictions found in the constitutional Bill of Rights. The Indian Civil Rights Act confirms rather than undermines the holding of *Talton*, since the need for the statutory limitations on tribal power imposed by the Act was largely based on the premise that tribal courts are not arms of the federal government and thus not subject to constitutional limitations. See S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967); Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harvard Journal on Legislation 557, 588 (1972); Clinton, *supra*, 18 Ariz. L. Rev. at 561-562; Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1345 (1969).

ernment, as the court of appeals held, but the original and inherent sovereignty of the Indian tribe.[12]

The court of appeals further stated that if "forced to choose a relevant analogy" by which to define the status of tribal courts for dual sovereignty pur-

[12] The court of appeals for the Eighth Circuit has recently held, in express disagreement with the court of appeals here, that " 'Tribal Courts are not arms of the same sovereign as the United States District Court,' " and thus that the Double Jeopardy Clause does not bar successive tribal and federal prosecutions for the same offense. *United States* v. *Walking Crow*, No. 77-1136, decided August 10, 1977, slip op. 4, petition for a writ of certiorari pending (No. 77-5539), citing and quoting *United States* v. *Kills Plenty*, 466 F.2d 240 (C.A. 8), and *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (C.A. 8).

The Ninth Circuit itself has recognized the sovereignty of Indian tribes and tribal courts on other occasions. In *Oliphant* v. *Schlie*, 544 F.2d 1007 (C.A. 9), certiorari granted *sub nom. Oliphant* v. *The Suquamish Indian Tribe*, No. 76-5729, June 13, 1977, the court of appeals, in holding that a tribal court could properly try and convict a non-Indian for certain tribal offenses, reasoned that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed" (544 F.2d at 1009). In the court's view, the question was "not whether Congress has conferred jurisdiction [over non-Indians] upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question • • • is, did Congress (or a treaty) take that jurisdiction away" (*id.* at 1009 n. 1). See also *Tom* v. *Sutton*, 533 F.2d 1101, 1103 (C.A. 9) ("Under their sovereign status, the Indian tribes are vested with the inherent power to create and administer a criminal justice system"). See also *Settler* v. *Lameer*, 507 F.2d 231 (C.A. 9); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176 (C.A. 9). But see *Colliflower* v. *Garland*, 342 F.2d 369 (C.A. 9) (dealing with a Court of Indian Offenses (see note 8, *supra*)).

poses, it would select not state courts but territorial courts, which were described in *Grafton* v. *United States*, 206 U.S. 333, as "civil court[s] proceeding under the authority of the United States" (Pet. App. A, pp. 5a-6a). That choice was misguided.

The Philippine territorial court under consideration in *Grafton* was, as this Court stated, a "tribunal deriving its jurisdiction and authority from the United States" (206 U.S. at 352). "[T]he Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States" (*id.* at 354). As the Court has since stated in *Waller* v. *Florida*, 397 U.S. 387, the relationship of the Philippine territorial government to the federal government was analogous for dual sovereignty purposes to "the relationship between municipal and state governments," where the power of the municipal court "springs from the same organic law that created the state court of general jurisdiction" (*id.* at 393). See note 2, *supra*.

In both *Grafton* and *Waller*, the two governmental entities seeking to prosecute for the same acts derived their authority from the same source, the federal government in *Grafton* and the state government in *Waller*. In contrast, as *Talton* v. *Mayes* makes clear, the powers of Indian tribal courts do not spring from the federal government but from a preexisting and independent tribal sovereignty that

the federal government simply continues to recognize.[13]

d. Since tribal prosecutions are not prosecutions by an arm of the federal sovereign, the Double Jeopardy Clause—which forbids a second prosecution

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[13] In *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, relied on by respondent (Memo. in Opp. 3-4), this Court in *dicta* (see *Waller* v. *Florida*, *supra*, 397 U.S. at 393 n. 5) stated that the insular courts of Puerto Rico and the federal district court for Puerto Rico "are creations emanating from the same sovereignty" and therefore that prosecution in one court would bar prosecution in the other court for the same offense (302 U.S. at 264). The Court's opinion describes at length (*id.* at 258-264) the source of Puerto Rico's authority as a "congressional grant of power" reflecting "the general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters" (*id.* at 263). Puerto Rico's status in 1937 when *Shell Co.* was decided was thus different from that of a State or an Indian tribe, neither of which derives its authority from federal statutes.

Respondent points out (Memo. in Opp. 3-4) that Puerto Rico now has a "degree of autonomy and independence normally associated with States of the Union" (*Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572, 594; see Pet. App. A, p. 5a n. 7), and argues that *Shell Co.* therefore stands for the proposition that the Court will not apply the dual sovereignty principle outside the precise federal-state context. The argument is misleading. The "quasi-statehood" of Puerto Rico arose only in 1952, when by the Act of July 3, 1950, 64 Stat. 319, "Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States" (*Examining Board*, *supra*, 426 U.S. at 597). Whether the *dicta* in *Shell Co.* would be followed today in the light of this "compact" (426 U.S. at 593) with the people of Puerto Rico is an open question. But the Indian tribes, unlike the government of Puerto Rico, have never been creations of federal sovereignty.

"after a first trial for the same offense *under the same authority*," *United States* v. *Lanza*, *supra*, 260 U.S. 382 (emphasis added)—does not bar prosecution in federal court after prosecution in a tribal court for a lesser included offense arising from the same acts. Indian tribes and the federal government, like states and the federal government, are "two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382). In the exercise of their respective powers as applied to the acts of respondent Wheeler, the Navajo Tribe and the federal government have each determined "what shall be an offense against its peace and dignity" (*ibid.*).

It might be argued that there is no independent tribal interest in dealing with conduct such as respondent's—that the former tribal interest in dealing with serious offenses involving Indians has been displaced by Congress' assertion of its guardianship role through enactment of the Major Crimes Act.[14]

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[14] As pointed out in *Keeble* v. *United States*, *supra*, 412 U.S. at 210, the Act was passed in 1885 out of a belief by Congress that tribal remedies for serious offenses "were either nonexistent or incompatible with principles that Congress thought should be controlling." Section 3242 of Title 18, derived from the Act, therefore provides that an Indian tried under the Major Crimes Act "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the [major] crimes within the exclusive jurisdiction of the United States." *Keeble* held that, under Section 3242, an Indian tried for a major crime is entitled to a lesser-included-offense instruction (if warranted by the evidence) even though

But this is not so. The Major Crimes Act, as the government has previously noted (see *United States* v. *Antelope*, *supra*, 430 U.S. at 643 n. 1), is "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." It was not intended to extinguish the independent interest of the tribes in dealing with conduct affecting relations within the tribe, or to abrogate the long-established policy "that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise" (*United States* v. *Quiver*, *supra*, 241 U.S. at 605-606).[15]

Section 1153 does not expressly confer jurisdiction over the lesser offense. But *Keeble* expressly left undisturbed the balance of jurisdiction on the reservations which leaves to the tribes exclusive authority to initiate prosecutions for simple assault and similar lesser crimes by Indians; it held only that Congress had elected to permit Indian defendants to avail themselves of a right available to non-Indians in federal courts (see 18 U.S.C. 1152 and 113). As the Court said (412 U.S. at 214), its holding "neither expands the reach of the Major Crimes Act nor permits the Government to infringe the residual jurisdiction of a tribe by bringing prosecutions in federal court that are not authorized by statute. We hold only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense, assuming of course that the evidence warrants such an instruction. No interest of a tribe is jeopardized by this decision."

[15] This Court has not had occasion to decide whether the Major Crimes Act supersedes or only supplements tribal juris-

A significant tribal interest in punishing conduct such as respondent's thus persists despite the assertion of federal power to punish the same acts. Respondent's conduct here violated a tribal ordinance (against contributing to the delinquency of a minor) designed to enforce the tribe's interest in maintaining the internal peace and order of the Indian community and the personal safety and dignity of its members. Respondent therefore was properly subject to punishment by the tribal court. At the same time his conduct may have constituted, as the federal indictment alleged, a major federal crime (carnal knowledge of a female under the age of sixteen).[16] Each government, tribal and federal, should be entitled to give effect to its separate interest in keeping the peace and maintaining justice.

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diction over major crimes. See *Talton* v. *Mayes, supra;* Clinton, *supra*, 18 Ariz. L. Rev. at 559-560. Of course, the Indian Civil Rights Act (25 U.S.C. 1302(7)) now limits the sentencing power of tribal courts so as to disable them from effectively punishing major crimes.

[16] Respondent's conduct may also have constituted, as alleged in the earlier federal indictment that was dismissed on grounds unrelated to respondent's culpability, see page 4, note 1, *supra*, the major federal crime of assault with intent to rape.

2. Failure to apply the dual sovereignty principle to successive prosecutions by tribal and federal courts would lead to "undesirable consequences" of the same kind that the principle, as applied in the federal-state context, was designed to avoid.

The court of appeals' holding in this case means that an Indian who is convicted in tribal court of a violation of tribal law that constitutes a lesser included offense of one of the crimes enumerated in the Major Crimes Act (18 U.S.C. 1153) may not subsequently be tried in federal court for the "major crime" arising from the same conduct. If this holding stands, respondent will have avoided prosecution for a crime for which he was liable to be imprisoned for up to 15 years (18 U.S.C. 2032), by pleading guilty to a minor offense in tribal court and incurring a relatively minor sentence.[17] Indeed, if the court of appeals is correct, then any Indian who commits a major crime such as murder, arson, or rape, which subjects him to federal prosecution and the possibility of significant punishment under 18 U.S.C. 1153, would secure immunity from such prosecution by standing trial in Indian tribal court—or pleading

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[17] Although the offense with which respondent is here charged—carnal knowledge of a minor female—does not necessarily entail use of force, there was against respondent at least a *prima facie* case of forcible sexual assault, as evidenced by the original indictment for assault with intent to rape that was dismissed on grounds unrelated to respondent's culpability (see page 4 and note 1, *supra*). If respondent indeed committed a forcible sexual assault, the sentence imposed by the tribal court, which respondent could satisfy by paying a fine of $150, might well be considered less than adequate punishment.

guilty, as respondent did—on a minor offense that is a lesser included offense of the major crime."[18] See *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977, slip op. 7-8. Such a result is not only unwarranted by precedent, as we have argued, but its foreseeable consequences provide additional reason for this Court to reject the conclusion of the court of appeals.

These would be much like the "undesirable consequences" to which this Court pointed in *Abbate* v. *United States*, *supra*, when it refused to overrule the holding in *United States* v. *Lanza*, *supra*, that a previous conviction by a State does not operate as a constitutional bar to federal prosecution for the same acts. As the Court said (359 U.S. at 195; see page 15, *supra*), "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered," especially where the sentence for the federal offense is markedly greater than that for the state offense. But, the Court continued, "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on

[18] Moreover, the holding of the court of appeals is not limited to federal prosecutions under the Major Crimes Act (see Pet. App. A, p. 8a). It would also apply, for example, to cases where an Indian was charged with assaulting a federal officer (18 U.S.C. 111) after having been tried in tribal court for assault involving the same acts. See *United States* v. *Feola*, 420 U.S. 671; *Stone* v. *United States*, 506 F.2d 561 (C.A. 8), certiorari denied, 420 U.S. 978.

acts which might also violate federal law," a step that "would bring about a marked change in the distribution of powers to administer criminal justice * * *" (*ibid.*). Thus, the Court concluded, "unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions" (*ibid.*).

Similarly here, federal law enforcement must necessarily be hindered if the Double Jeopardy Clause bars a federal prosecution following prosecution in Indian tribal court for a lesser included offense. Since by virtue of the Indian Civil Rights Act (25 U.S.C. 1302(7)) the tribal courts may impose no sentences exceeding six months' imprisonment, it seems reasonable to assume that many persons who have committed serious crimes on the reservations would seek to avoid punishment commensurate with the gravity of their offense by first standing trial (or pleading guilty) in tribal court. See *United States* v. *Walking Crow*, *supra*, slip op. 6.[19] Under

[19] There are numerous reported instances in which an Indian defendant in federal court has been previously tried in a tribal court for a minor offense arising out of the same acts. See, *e.g.*, *United States* v. *Keeble*, 459 F.2d 757 (C.A. 8), reversed, 412 U.S. 205; *United States* v. *Kills Plenty*, 466 F.2d 240 (C.A. 8); *United States* v. *DeCoteau*, 516 F.2d 16 (C.A. 8); *United States* v. *DeMarrias*, 441 F.2d 1304 (C.A. 8).

If the tribal conviction for a lesser included offense bars a subsequent federal prosecution for a "major crime," the result

the existing relationship between the Indian tribes and the federal government, federal authorities would be virtually powerless to prevent this result. Federal prosecutors have no control over the institution and disposition of proceedings in tribal court. Such proceedings often are held so swiftly that federal prosecutors may not be aware of the commission of the offense before the tribal proceeding has been completed, much less be able to present the matter to a grand jury and convene a trial. Here, for instance, the incident that gave rise to the charges against respondent occurred on October 16, 1974, and respondent pleaded guilty to the tribal offense on October 18, 1974 (see Pet. App. A, p. 2a).[20]

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will contravene the congressional policy behind the Major Crimes Act as expressed in a Senate Report on the 1968 amendment to the Act (quoted by this Court in *Keeble* v. *United States*, *supra*, 412 U.S. at 211 n. 10):

> "Without this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 month[s]. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court, where the punishment will be in proportion to the gravity of the offense." [Quoting S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967).]

[20] It might be suggested that tribal prosecutors and courts would forego voluntarily the prosecution of major offenses, in deference to the superior punishing power of federal courts, but that is not an adequate answer to the problem. Tribal authorities may well be unwilling to eschew prosecution of a violation of tribal law and rely on the federal government to prosecute and punish the offender. Such an abdication of authority might be considered inconsistent with tribal independence and the right of the tribe to define and prosecute offenses against its own peace and dignity. Many tribes traditionally have had distinctive concepts of justice and of the role of judges and punishment in criminal cases (see note 25, *infra*), and these unique tribal interests would be compromised by foregoing or deferring tribal prosecution in favor of federal prosecution. Moreover, selective deferral of prosecution might pose significant practical problems for the tribe. Tribal prosecutors and courts would have to screen cases to determine whether the conduct involved was prosecutable under federal law, and perhaps to determine ~~which~~ the United States Attorney was in fact willing to prosecute. The result, even if feasible, could be a substantial surrender of the tribe's own criminal justice authority.

Affirmance of the decision below could thus be expected, at least in the short run, to frustrate federal law enforcement with respect to major crimes committed by Indians in Indian country. It is reasonable to predict, however, that Congress would act to remedy the problem by restructuring the relationship between the tribal and federal courts—by putting into effect "a marked change in the distribution of powers to administer criminal justice" (*Abbate* v. *United States*, *supra*, 359 U.S. at 195). But the need for such legislation would confront Congress with a dilemma, forcing it to choose between values that have guided federal Indian policy in recent decades.

On the one hand, Congress might dramatically expand the scope of tribal criminal jurisdiction over serious crimes on the reservations, and correspondingly increase the sentences that tribal courts could impose. Yet such a choice, besides requiring careful evaluation of the present capabilities of the multifarious tribal courts and law enforcement mecha-

nisms, necessarily would reverse basic policy judgments made in the Major Crimes Act and in the Indian Civil Rights Act of 1968.

On the other hand, and perhaps more likely, Congress might respond to the evidence that "tribal criminal trials [have] become protective mechanisms for potential Major Crimes Act defendants" [21] by imposing further limitations on the powers of the tribal courts. These limitations could range from outright elimination of tribal criminal jurisdiction to some form of day-to-day federal control over the prosecutorial decisions of tribal authorities. Yet such inroads on the self-governing powers of the tribes would undermine the prevailing policy of the federal government to foster tribal self-government and, in particular, an increased role for the tribal judicial systems. As the American Indian Policy Review Commission has stated in its *Final Report* (p. 5-29):[22]

> The implications of [the *Wheeler*] decision for jurisdiction of Indian tribes and for the power of Congress to take corrective action through

[21] Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev. 387, 406 (1974).

[22] The Commission was established by the Act of January 2, 1975, Pub. L. 93-580, 88 Stat. 1910, "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians" (25 U.S.C. (Supp. V) 174 note). The Commission's *Final Report* was submitted to the Congress on May 17, 1977.

> legislation are apparent. If the doctrine of double jeopardy is applicable to judgments of tribal courts, there seems little doubt that either the Courts or Congress will soon strip the tribes of authority to act in any situation which might potentially be prosecuted in Federal court. It is simply not tolerable that a person can plead guilty in tribal court to a minor offense and thereby preclude prosecution in Federal court for a major offense. It is essential that the separate sovereignty of the tribes continue to be recognized if the jurisdictional balance between tribal and Federal courts is to be maintained.

There are approximately 71 tribal courts [23] currently operating, handling tens of thousands of cases per year.[24] These courts are generally viewed as central to the preservation of Indian culture and political identity (see, *e.g.*, *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-1145 (C.A. 8)). As one commentator has said (Clinton, *supra*, 18 Ariz. L. Rev. 557), "the tribal courts are often the

[23] This figure is obtained from statistics compiled by the Department of the Interior as of March 18, 1977; see also Clinton, *supra*, 18 Ariz. L. Rev. at 554 and n. 263. In addition to the "tribal courts" such as the Navajo courts involved here (see note 10, *supra*), there are 16 "traditional" or semi-religious courts which also derive from the tribes' own self-governing powers but typically operate without written ordinances, and 32 Courts of Indian Offenses (described above, n. 8). See also Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311, 321-322 (1969).

[24] All told, the Indian courts handle an estimated 80,000 cases per year. American Indian Policy Review Commission, *Final Report*, p. 5-36.

single most important vestige of tribal sovereignty on the reservations."

The American Indian Policy Review Commission has stressed the importance of the tribal courts to the future of tribal self-government.[25] The Commission finds in its *Report* (p. 5-42; see note 22, *supra*) that tribal courts, though varying greatly in individual performance, on the whole "are evolving institutions that are capable of fair and efficient justice." The *Report* recommends that Congress take steps to promote their "maintenance and development," a process that "will require tribal experimentation and time." The decision of the court of appeals, however, threatens any efforts to enhance the capability and authority of the tribal courts.

The rule of the decision below would thus produce, if not an unacceptable hindrance of federal law en-

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[25] Several justifications have been advanced for maintaining an independent system of tribal courts. Effective application of Indian law, which in comparison to federal and state systems shows a stronger inclination to "restitutive" rather than "retributive" justice, may well call for a specialized judge capable of performing the arbitral duties of the tribal elder. Many Indians also feel that they will receive more equitable treatment in Indian courts than in others. Furthermore, many Indians see tribal justice as reflecting a unique concern for the individual defendant, as evidenced, for example, by the relaxed procedures for granting pre-trial release on personal recognizance. Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1834-1837 (1968). See Hearings on the Constitutional Rights of the American Indian, S. Res. 53, before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (Part 1) 15-16 (1961).

forcement authority, an imperative that Congress restructure the balance of criminal-justice powers between the federal government and the tribes in a way that sacrifies some important value of present federal policy. These "undesirable consequences" provide strong ground, as they did in *Abbate*, for applying the dual sovereignty principle to conclude that the Double Jeopardy Clause is no bar to the federal prosecution in this case.

C. Even If Tribal Courts Are Viewed As Arms of the Federal Sovereign, the Double Jeopardy Clause Does Not Bar Prosecution for a Major Crimes Act Felony in a Federal District Court After Conviction of a Lesser Included Offense Under Tribal Law in a Tribal Court.

The decision of the court of appeals rests on the assumption that, unless the dual sovereignty principle applies, the Double Jeopardy Clause inevitably bars prosecution of a defendant who has been convicted [illegible] of a lesser included offense based on the same acts. The decision last Term in *Brown* v. *Ohio*, *supra*, "establishes the general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense" (*Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, plurality opinion, slip op. 12). But that "general rule" is not absolute; it "does have some exceptions" (*id.* at 13). We submit that, even if the tribal and federal courts are viewed as arms of the same sovereign and hence as subject

to the general rule of *Brown* v. *Ohio*,[26] a federal prosecution following a tribal prosecution in the circumstances of this case constitutes an exception to that rule and is not barred by the Double Jeopardy Clause.

1. The plurality opinion in *Jeffers* noted three exceptions to the bar against successive prosecutions. One arises "when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun" (slip op. 13), as in *Diaz* v. *United States*, 223 U.S. 442. A second may exist "when the facts necessary to the greater

[26] We would also suggest that the Double Jeopardy Clause may not be such a wooden instrument that it must either be wielded with full force as in *Brown*, or set aside entirely under the dual sovereignty principle. There may be a middle range of dual-authority cases where the Clause applies in its essentials, but where its impact on prosecution for a greater offense after conviction for a lesser included offense is not subject to the analysis of *Brown*. In *Brown*, the successive prosecutions by the municipality and the county were "the acts of a single sovereign under the Double Jeopardy Clause" (slip op. 3 n. 4) not only in the sense that both prosecuting authorities derived their power from the State of Ohio, see *Waller* v. *Florida*, 397 U.S. 387, but also in the sense that both prosecutions were laid under the same statute, the Ohio Revised Code (see *Brown*, slip op. 1-2). In such a case it is true that

> * * * the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. [*id.* at 4.]

Such freedom for the exercise of legislative prerogatives is not preserved, however, where the Double Jeopardy Clause is applied to bar a prosecution under the laws of one legislature because of a previous prosecution under the laws of another legislature. In such cases, the gravity of the interference with the legislative function varies with the separateness and independence of the two legislatures and the polities they represent. Even short of the point where the dual sovereignty principle comes into play, the two legislative bodies may be sufficiently separate and independent, and the two statutes which the defendant is accused of violating sufficiently different in the interests they seek to vindicate, that the approach adopted in *Brown* v. *Ohio* for cases of successive prosecutions by "a State or the Federal Government" may not apply. Thus, all the considerations that render Indian tribes, their courts, and their criminal laws different from the federal government, its courts, and its criminal laws might be taken into account in this case to conclude that, even if the dual sovereignty principle were held not to apply, the circumstances nonetheless call for a more flexible application of the Double Jeopardy Clause than the one adopted in *Brown* v. *Ohio*.

were not discovered despite the exercise of due diligence before the first trial" (*id.* at 14; accord, *Brown* v. *Ohio*, *supra*, slip op. 8 n. 7). "[A]nother exception" was recognized in *Jeffers* itself, covering cases where "the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other" (slip op. 14). And Mr. Justice Brennan in his concurring opinion in *Ashe* v. *Swenson*, 397 U.S. 436, stated that "[a]nother exception would be necessary if no single court had jurisdiction of all the alleged crimes" (*id.* at 453 n. 7).

The Court has thus recognized that, despite the general rule of *Brown* v. *Ohio*, prosecution for a greater offense after conviction of a lesser included

offense remains permissible in exceptional circumstances. Such circumstances exist, as the listed exceptions indicate, when there is a compelling reason why the greater offense could not have been tried, or was not tried, simultaneously with the lesser offense. Given such circumstances, there are measures that can be invoked, as the Court explained in *Diaz*, to permit the second trial but nonetheless assure that the subsequent prosecution for the greater offense does not put the defendant "twice * * * in jeopardy" for the lesser offense on which he has previously been convicted.[27]

2. The circumstances of this case either bring it within one of the recognized exceptions to the rule barring successive prosecutions or warrant recognition of a further exception. As we have already discussed (pp. 37-38, *supra*), Indian tribes and tribal courts exercise criminal jurisdiction quite

[27] In *Diaz* the Court approved a prosecution for murder where, after the defendant had been convicted of assault and battery, the victim died and the homicide charge was brought. The Court explained (223 U.S. at 449) that the defendant had not been in jeopardy for the homicide at the trial for assault and battery and that "[a]ll that could be claimed for [the jeopardy of that trial] was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done * * *." Double punishment for the same offense, which the Double Jeopardy Clause also prohibits, can be avoided in such circumstances by taking into account, when fixing the sentence on the greater offense, any sentence already imposed for the lesser offense. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 289 n. 128 (1965).

independently of federal prosecutors and the federal district courts. Even if this Court were to conclude that, as a conceptual matter, tribal courts derive their power from the federal sovereign, it is nevertheless the fact that, under existing arrangements, tribal courts operate wholly apart from federal district courts and tribal prosecutors are in no respect under the supervision or control of United States Attorneys. There are, as we have stressed, legitimate and compelling reasons for this arrangement: independent tribal courts are vital components of tribal self-government, and their contribution to the preservation of Indian culture and identity is essential to major policy objectives of the federal government.

There are also legitimate and compelling reasons why, given the unique status of Indian tribes and their courts, the need may arise for successive prosecutions by the tribe and the federal government arising from the same acts. The sentencing authority of tribal courts is so limited by the Indian Civil Rights Act that they cannot adequately punish defendants who have committed serious crimes. Yet the tribal courts are empowered to try such defendants. And they may often be expected to do so, as the Navajo court did in this case, before a United States Attorney would be able to secure an indictment instituting a prosecution in the federal district court (or even learn of the occurrence of the offense).

Such circumstances would seem to bring this case within the exception to the bar on successive prose-

cutions, suggested both by the plurality in *Jeffers* (slip op. 14) and the Court in *Brown* v. *Ohio* (slip op. 8 n. 7), applicable where the prosecution "is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge * * * have not been discovered despite the exercise of due diligence" (*ibid.*). In such circumstances, even after conviction and punishment by the tribal court, it is reasonable for the United States Attorney to seek a penalty commensurate with the defendant's crime as provided for by federal law.

This federal prosecution would not be an attempt to harass the defendant, nor an instance of the "repeated attempts to convict an individual for an alleged offense" that the Double Jeopardy Clause was intended to prohibit (*Green* v. *United States*, 355 U.S. 184, 187). On the contrary, where the defendant has committed a serious felony that has not been adequately punished in tribal court, the subsequent federal prosecution by the United States Attorney would be not only a legitimate exercise of his separate prosecutorial authority, but also a measure compelled by the congressional policy reflected in the Major Crimes Act.[28] In the unique circumstances presented by the independence and the sharply lim-

[28] See *Keeble* v. *United States*, *supra*, 412 U.S. at 210-211 and n. 10, where the Court noted the "congressional purpose * * * evident in the most recent amendment to the [Major Crimes] Act" as reflected in a passage from a Senate Report (S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967)), quoted in note 19, *supra*.

ited sentencing power of Indian tribal courts,[29] then, an exception to the rule of *Brown* v. *Ohio* should be recognized to allow a subsequent federal prosecution such as was attempted in this case.[30]

3. Moreover, the subsequent federal prosecution in the circumstances of this case falls within the exception that Mr. Justice Brennan in *Ashe* v. *Swenson*, *supra*, 397 U.S. at 453 n. 7, said "would be necessary if no single court had jurisdiction of all the alleged crimes." Respondent was not put in jeopardy of conviction of carnal knowledge during the proceedings against him in tribal court. Carnal knowledge was not charged in the criminal complaints filed against him in the name of the Navajo Tribe (A. 7-8), nor could it have been; tribal courts have no jurisdiction to try charges of the federal offense

[29] Cf. *Middendorf* v. *Henry*, 425 U.S. 25.

[30] In 18 U.S.C. 1152, which derives from statutes passed in 1834 and 1854 (4 Stat. 729, 733; 10 Stat. 269, 270; see p. 22, *supra*), Congress has provided that, in general, "the general [criminal] laws of the United States * * * shall extend to the Indian country." The statute provides an exception, however, for cases in which "any Indian committing any offense in the Indian country * * * has been punished by the local law of the tribe * * *." In contrast, the Major Crimes Act (18 U.S.C. 1153), which was enacted in 1885 (23 Stat. 362, 385) and extends federal jurisdiction to certain enumerated crimes committed by Indians in Indian country, contains no such exception. The Major Crimes Act thus reflects a congressional judgment that the enumerated offenses should be subject to trial in federal court whether or not the defendant has previously been convicted in tribal court—a judgment reconfirmed as recently as the 1968 amendment to the Act, see notes 19 and 28, *supra*.

of carnal knowledge under 18 U.S.C. 2032, and the Navajo Tribal Code contains no such offense.[31] Respondent's trial in federal district court would therefore be his first jeopardy of conviction of carnal knowledge.

At the same time, respondent at his federal trial would not again be in jeopardy for the offense of contributing to the delinquency of a minor. This offense was not charged in the indictment filed in federal district court, nor could it have been; federal courts have no jurisdiction to try tribal offenses, and where as here the alleged crime is committed by an Indian against another Indian, federal district courts have no jurisdiction over any indictment unless the offense is one of those enumerated in the Major Crimes Act (18 U.S.C. 1153; see 18 U.S.C. 1152). Contributing to the delinquency of a minor is not one of the enumerated offenses. Respondent therefore would not be placed in a second jeopardy for that offense in a federal trial on the carnal knowledge charge,[32] though he would, of course, be

[31] Although it is open to dispute whether Indian tribes can prosecute major crimes (see note 15, *supra*), the Navajo Tribe has chosen not to do so. In the Tribal Council Resolution adopting its law and order code (CJA-1-59), the Tribe states that "[i]t is not the intent of this resolution to usurp or interfere with enforcement of the * * * Major Crimes Law * * *" (see historical notes at 17 Navajo Tribal Code 1).

[32] The conclusion that this case falls within the exception where "no single court had jurisdiction of all the alleged crimes" is not inconsistent with *Keeble* v. *United States*, *supra*.

protected against cumulative punishment for the two offenses arising from the same acts."

In sum, the unique circumstances presented by the dual jurisdiction of federal district courts and Indian tribal courts require, consistently with the recognized exceptions to the bar on successive prosecutions for

The Court there held (412 U.S. at 214) that if "the evidence warrants such an instruction," a defendant prosecuted under the Major Crimes Act may avail himself of "the protection afforded by an instruction on a lesser included offense" despite the district court's lack of independent jurisdiction over that offense. For several reasons, *Keeble* does not establish, for purposes of the exception to the bar on successive prosecutions, that the trial in the federal court would place respondent again in jeopardy for the lesser included tribal offense. First, the lesser-included-offense charge presumably would be derived from state or federal rather than tribal law. (Here, Arizona has a statute proscribing acts contributing to the delinquency of a minor (Ariz. Rev. Stat. Ann. 13-821, 13-822), although the elements are slightly different from those of the tribal offense. See also *Williams* v. *United States*, 327 U.S. 711.) Second, the facts as proved at the federal trial may not warrant the instruction, which need not be given unless "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" (412 U.S. at 208). Third, it would seem in any event that, consistently with *Diaz* v. *United States*, *supra*, 223 U.S. at 449, the Double Jeopardy Clause would protect the defendant from conviction or punishment on a verdict of guilty returned by the jury in federal court on the lesser included offense, since he had previously been subjected to jeopardy for that offense. Finally, the defendant's act of requesting the instruction on the lesser included offense in the federal court trial might properly be regarded as a waiver of any right he would otherwise have not to be subjected to a second trial on that particular offense. Cf. *Jeffers* v. *United States*, *supra*, slip op. 14.

[33] See note 27, *supra*.

greater and lesser included offenses, that respondent's conviction in tribal court of the tribal offense of contributing to the delinquency of a minor not bar his subsequent prosecution in federal district court for the federal crime of carnal knowledge.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 251350 104